

November 16, 2005

DECISION AND ORDER

OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Natural Resources Defense Council

Date of Filing: October 17, 2005

Case Number: TFA-0127

This Decision concerns an Appeal that was filed by the Natural Resources Defense Council (hereinafter referred to as “NRDC”) in response to a Determination issued to it by the Director of the Department of Energy’s FOIA/Privacy Act Group (hereinafter referred to as “the Director”). In that determination, the Director replied to a request for documents that NRDC submitted under the Freedom of Information Act, 5 U.S.C. § 552, as implemented by the Department of Energy (DOE) in 10 C.F.R. Part 1004. This Appeal, if granted, would require that the DOE conduct another search for responsive documents.

In its FOIA request, NRDC sought access to all documents regarding (i) the toxicity of perchlorate, (ii) the health or environmental effects of perchlorate, (iii) the detection of perchlorate in groundwater, soil or surface water at any DOE or contractor facilities, (iv) risk assessments for perchlorate, (v) potential drinking water or cleanup standards for perchlorate, (vi) cost estimates for any perchlorate remediation or cleanup, (vii) the National Academy of Sciences study of perchlorate, or (viii) any legislation regarding perchlorate. NRDC later limited its request to documents created during and after 1998. *See* September 16, 2005 Determination Letter from Abel Lopez, Director, FOIA/Privacy Act Group to Aaron Colangelo, NRDC.

In this Determination, the Director stated that NRDC’s request was referred to the Headquarters Office of Environmental Management (EM) for a search of its files. Determination at 1. This search produced 28 documents that are responsive to NRDC’s request. These documents were provided to NRDC in their entirety.

In its Appeal, NRDC contests the adequacy of the search that was performed. NRDC points out that one of the 28 documents released states that “[f]ive [DOE] sites have suspected or confirmed perchlorate contamination: the Los Alamos and Sandia National Laboratories in New Mexico; the Pantex Plant in Texas; and the Energy Technology Engineering Center and Lawrence Livermore National Laboratory Site 300 in California.” NRDC Appeal, Attachment C. However, no sampling data from those sites was included in the material released to NRDC. Moreover, that same document states that “[a]t Livermore, an interim Record of Decision to clean up perchlorate contamination is

in place and cleanup is ongoing.” No Record of Decision was provided to the requester. NRDC therefore argues that the search conducted was inadequate, and requests that another search be performed.

We have stated on numerous occasions that a FOIA request deserves a thorough and conscientious search for responsive documents, and we have not hesitated to remand a case where it is evident that the search conducted was in fact inadequate. *See, e.g., Butler, Vines and Babb, P.L.L.C.*, 25 DOE ¶ 80,152 (1995). The FOIA, however, requires that a search be reasonable, not exhaustive. “[T]he standard of reasonableness which we apply to agency search procedures does not require absolute exhaustion of the files; instead, it requires a search reasonably calculated to uncover the sought materials.” *Miller v. Department of State*, 779 F.2d 1378, 1384-85 (8th Cir. 1985) (*Miller*); *accord, Weisberg v. Department of Justice*, 745 F.2d 1476, 1485 (D.C. Cir. 1984). In cases such as these, “[t]he issue is not whether any further documents might conceivably exist but rather whether the government’s search for responsive documents was adequate.” *Perry v. Block*, 684 F.2d 121, 128 (D.C. Cir. 1982).

In order to obtain further information concerning the scope of the search that was performed, we contacted the Director’s Office and EM. We were informed that the initial search that resulted in the location of the 28 documents that were released to NRDC encompassed only EM’s headquarters offices. *See* memorandum of November 4, 2005 telephone conversation between Verlette Moore, FOIA/Privacy Act Group, and Robert Palmer of this Office. Given the information submitted by NRDC, we conclude that “a search that is reasonably calculated to uncover the sought materials,” *Miller*, must in this case include DOE and contractor facilities located at the Los Alamos and Sandia National Laboratories in New Mexico, the Pantex Plant in Texas, and the Energy Technology Learning Center and the Lawrence Livermore National Laboratory Site 300 in California. In fact, we have been informed by EM that a search of these facilities is currently being conducted. *See* memorandum of November 4, 2005 telephone conversation between Joni Boone, EM, and Mr. Palmer.

We will therefore remand this matter to EM. On remand, EM should continue to search at the facilities named above for responsive documents. In addition, if there are any other locations in which such documents are likely to be located, those locations should be searched as well. Upon completion of this search, a new determination letter should be issued to NRDC in as expeditious a manner as is possible.

It Is Therefore Ordered That:

- (1) The Freedom of Information Act Appeal filed by the Natural Resources Defense Council, OHA Case Number TFA-0127, is hereby granted as set forth in paragraph (2) below.
- (2) This matter is hereby remanded to the Office of Environmental Management for additional proceedings consistent with the directions set forth in this Decision.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: November 16, 2005